

***United States Court of Appeals
for the Second Circuit***



**BRIEF FOR
APPELLEE**

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76-6091

To be argued by
NATHANIEL L. GERBER

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 76-6091

RICHARD J. DE FINA,

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P/S
Plaintiff-Appellant,

—v.—

FEDERAL AVIATION ADMINISTRATION, ET AL.,

Defendants-Appellees.

RICHARD J. DE FINA,

Plaintiff-Appellant,

—v.—

VIRGINIA M. ARMSTRONG, ET AL.,

Defendants-Appellees.

RICHARD J. DE FINA,

Plaintiff-Appellant,

—v.—

CLARENCE M. KELLEY, ET AL.,

Defendants-Appellees.

RICHARD J. DE FINA,

Plaintiff-Appellant,

—v.—

RITCHEY WILLIAMS, ET AL.,

Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

FEDERAL DEFENDANTS-APPELLEES' BRIEF

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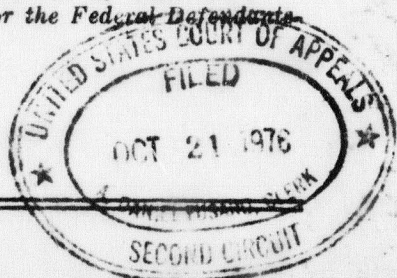


TABLE OF CONTENTS

	PAGE
Preliminary Statement	1
Questions Presented	2
Statement of the Case	3
1. Nature of the Case	3
2. Statement of Facts	5
Summary of Argument	14
Nature of the Information in Dispute	14
Background of the FOIA	16
ARGUMENT:	
POINT I—The District Court correctly held that the information withheld by the appellee agencies is exempt from compelled disclosure pursuant to Exemption 5 of the FOIA, 5 U.S.C. § 552(b) (5)	18
POINT II—The District Court correctly held that the identities of agency personnel and outside consultants are also protected from compelled disclosure by Exemption 6 of the Act, 5 U.S.C. § 552(b) (6)	26
POINT III—The District Court correctly found that the identities of the eligibles other than appellant are protected from compelled disclosure by Exemption 6 of the Act, 5 U.S.C. § 552(b) (6) ...	31
POINT IV—The District Court correctly held that the identities of outside consultants are protected from compelled disclosure by Exemption 7(C) and (D) of the Act, 5 U.S.C. § 552(b) (7) (C) and (D), and that the identities of the agency personnel are also protected by Exemption 7(C)	37

	PAGE
A. The Scope of Exemption 7	37
B. The identities of the individuals and/or companies contacted by the agencies as well as the identities of agency personnel who conducted the investigation are protected from compelled disclosure by Exemption 7(C)	40
C. The identities of the outside persons and/or companies who responded to the investigative inquiries are also protected by Exemption 7(D)	40
D. The pre-amendment case law as a measure of the substantive scope of Exemption 7 supports non-disclosure	43
POINT V—The District Court correctly held that the pleadings failed to state a claim for damages or injunctive relief over which it had jurisdiction or upon which any relief could be granted	44
CONCLUSION	50
APPENDIX:	
Statutory Appendix	1a

CASES CITED

<i>Ackerley v. Ley</i> , 420 F.2d 1336 (D.C. Cir. 1969)	18, 25
<i>Barr v. Matteo</i> , 360 U.S. 564 (1959)	47
<i>Bivens v. Six Unknown Agents of the Federal Bureau of Narcotics</i> , 456 F.2d 1339 (2d Cir. 1972) ...	48
<i>Black v. United States</i> , 534 F.2d 524 (2d Cir. 1976)	48

	PAGE
<i>Bocchicchio v. Curtis Publishing Co.</i> , 203 F. Supp. 403 (E.D. Pa. 1949)	42
<i>Boeing Airplane Co. v. Coggeshall</i> , 280 F.2d 654 (D.C. Cir. 1960)	19
<i>Bristol-Myers Co. v. Federal Trade Commission</i> , 424 F.2d 935 (D.C. Cir.), <i>cert. denied</i> , 400 U.S. 824 (1970)	16
<i>Brockway v. Department of Air Force</i> , 518 F.2d 1184 (8th Cir. 1975)	18, 19
<i>Brown v. General Services Administration</i> , 507 F.2d 1300 (2d Cir. 1974), <i>aff'd</i> , 44 U.S.L.W. 4704 (June 1, 1976)	46
<i>Carl Zeiss Stiftung v. V.E.B. Carl Zeiss, Jena</i> , 40 F.R.D. 318 (D.D.C. 1966), <i>aff'd sub nom, V.E.B. Carl Zeiss, Jena v. Clark</i> , 384 F.2d 979 (D.C. Cir. 1967), <i>cert. denied</i> , 389 U.S. 952 (1967)	19
<i>Citizens to Preserve Overton Park, Inc. v. Volpe</i> , 401 U.S. 402, 420, 91 S.Ct. 814, 825, 28 L.Ed. 2d 136, 156 (1971)	25
<i>Economu v. United States Dept. of Agriculture</i> , 535 F.2d 688 (2d Cir. 1976)	47, 49
<i>Environmental Protection Agency v. Mink</i> , 410 U.S. 573 (1973)	16, 18, 25
<i>Evans v. Department of Transportation</i> , 446 F.2d 821 (5th Cir. 1971), <i>cert. denied</i> , 405 U.S. 918 (1972)	43
<i>Getman v. N.L.R.B.</i> , 450 F.2d 670 (D.C. Cir. 1971) 26, 27, 30, 31, 33, 40	
<i>Gillman v. United States</i> , 53 F.R.D. 316 (S.D.N.Y. 1971)	19

	PAGE
<i>International Paper Co. v. Federal Power Commission</i> , 438 F.2d 1349 (2d Cir.), cert. denied, 404 U.S. 827 (1971)	18, 19
<i>Kent Corp. v. N.L.R.B.</i> , 530 F.2d 612 (5th Cir. 1976)	21, 24, 25
<i>KFC National Management Corp. v. N.L.R.B.</i> , 497 F.2d 298 (2d Cir. 1974)	25
<i>Koch v. Dep't. of Justice</i> , 376 F. Supp. 313 (D.D.C. 1974)	39
<i>Koch v. Yunich</i> , 533 F.2d 80 (2d Cir. 1976)	48
<i>Mitchell v. Roma</i> , 265 F.2d 633 (3d Cir. 1959)	42
<i>Montrose Chemical Corp. v. Train</i> , 491 F.2d 63 (D.C. Cir. 1974)	23, 24
<i>Morgan v. United States</i> , 304 U.S. 1 (1938)	24
<i>Nixon v. Sampson</i> , 389 F. Supp. 107 (D.D.C. 1975)	28
<i>N.L.R.B. v. Sears, Roebuck & Co.</i> , 421 U.S. 132 (1975)	18, 38, 43
<i>O'Keefe v. Boeing Company</i> , 38 F.R.D. 329 (S.D.N.Y. 1965)	19
<i>Robles v. Environmental Protection Agency</i> , 484 F.2d 843 (4th Cir. 1973)	27
<i>Rose v. Department of Air Force</i> , 495 F.2d 261 (2d Cir. 1974), aff'd 425 U.S. 352 (1976)	27, 29
<i>Roviaro v. United States</i> , 353 U.S. 53 (1957)	42
<i>Rowan v. United States Post Office Dept.</i> , 397 U.S. 728, 737, 90 S.Ct. 1484, 1491, 25 L.Ed. 2d 736 (1970)	34
<i>Sterling Drug Inc. v. F.T.C.</i> , 450 F.2d 698 (D.C. Cir. 1971)	18, 20, 23

	PAGE
<i>Soucie v. David</i> , 448 F.2d 1067 (D.C. Cir. 1971)	18, 21, 28
<i>United States v. Nixon</i> , 418 U.S. 683 (1974)	19
<i>United States v. Sherwood</i> , 312 U.S. 584 (1941) . . .	46
<i>Wine Hobby USA, Inc. v. United States Internal Revenue Service</i> , 502 F.2d 133 (3d Cir. 1974)	27, 28, 33, 34, 35
<i>Wu v. National Endowment For Humanities</i> , 460 F.2d 1030 (5th Cir. 1972), <i>cert. denied</i> , 410 U.S. 926 (1973)	18, 21

STATUTES AND AUTHORITIES CITED

Freedom of Information Act:

5 U.S.C. § 552	2
5 U.S.C. § 552(a) (3) (4) (B)	1a
5 U.S.C. § 552(a) (4) (E) and (F)	45
5 U.S.C. § 552(b) (5)	3, 4, 18, 2a
5 U.S.C. § 552(b) (6)	3, 4, 5, 26, 31, 2a
5 U.S.C. § 552(b) (7)	3, 4, 2a
5 U.S.C. § 552(b) (7C)	37
5 U.S.C. § 552(b) (7D)	37, 39, 41
Executive Order No. 10450, 3 C.F.R. Proc. 10450, as amended	35, 2a, 4a
Federal Tort Claims Act, 28 U.S.C. § 2671 <i>et seq.</i> . .	46
Federal Tort Claims Act, 28 U.S.C. § 2680	46
5 C.F.R. § 294.501(e)	35, 4a

	PAGE
<i>Federal Rules of Civil Procedure:</i>	
Rule 12 (b)	4
Rule 12 (b) (6)	49
Rule 56	49
Rule 42	2
Conf. Rep. No. 93-1200, 93rd Cong. 2d Sess. 1974 U.S. Code Cong. & Admin. News, pp. 6291-6292	39, 42
H. Rep. 1497, 89th Cong. 2d Sess. 11 (1966), U.S. Code Cong. & Admin. News, p. 2418	28
Senate Rep. 813 at 9, 89th Cong. 1st Sess. (1965) ..	26
S. Rep. No. 813, p. 3	17
Note, <i>The Freedom of Information Act and the Ex- emption of Intra-Agency Memoranda</i> , 86 Har- vard L. Rev. 1047, 1052-1053 (1973)	19
Note, <i>The Freedom of Information Act: A Seven- Year Assessment</i> ; 74 Columbia L. Rev. 895, 941 (1974)	21
Pub. L. No. 93-502, 88 Stat. 1561	37
120 Cong. Rec. 59336 (May 30, 1974)	38, 43
Pederson, <i>Normal Records and Informal Rule Making</i> , 85 Yale J. 38, 84 (1975)	25
Clark, <i>Holding Government Accountable: The Amend- ed Freedom of Information Act</i> , 84 Yale L.J. 741, 763 (1975)	38, 43
8 Wigmore, <i>Evidence</i> (McNaughton rev. 1961) at 2374	42
Note, <i>The Investigatory Files Exemption to the FOIA: The D.C. Circuit Abandons Bristol-Myers</i> , 42 George Wash. L. Rev. 869, 878 (1974)	44

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FEDERAL DEFENDANTS-APPELLEES' BRIEF

Preliminary Statement

Plaintiff-appellant Richard J. De Fina appeals from a Final Judgment and Order of the Honorable Whitman Knapp entered in the United States District Court for

the Southern District of New York (A. 46-50).^{*} The judgment was entered May 20, 1976 and was predicated upon unreported written opinions dated February 26, March 15, and April 19, 1976 respectively wherein Judge Knapp granted the Government's motion for judgment on the pleadings, treated as a motion for summary judgment, with respect to the federal defendants-appellees (A. 16-45). In so ruling, Judge Knapp held that the Government had sustained its burden of proof with respect to all claims asserted by plaintiff under the Freedom of Information Act, 5 U.S.C. § 552, and that plaintiff had failed to state a claim for damages and/or injunctive relief over which the District Court had subject matter jurisdiction or upon which any relief could be granted.

Although plaintiff-appellant originally commenced four separate actions against the various federal defendants-appellees, these actions were consolidated by the District Court pursuant to Rule 42 of the Federal Rules of Civil Procedure. The actions as originally commenced were the following: 1) *Richard J. De Fina v. The Federal Aviation Administration, et al.*, 75 Civ. 1526; 2) *Richard J. De Fina v. Virginia M. Armstrong, et al.*, 75 Civ. 1564; 3) *Richard J. De Fina v. Clarence M. Kelley, et al.*, 75 Civ. 2119; and 4) *Richard J. De Fina v. Ritchey Williams, et al.*, 75 Civ. 2362.

Questions Presented

1. Whether the District Court correctly held that the information not disclosed by the defendant-appellee agencies is exempt from compelled disclosure pursuant to Exemptions 5, 6 and 7 of the Freedom of Information

^{*} Hereinafter the Appendix filed by appellant will be referred to as "A. —." The Supplemental Appendix filed by federal defendants-appellees will be referred to as "S.A. —."

Act (the "FOIA" or the "Act"), 5 U.S.C. §§ 552(b)(5), (6), (7).

2. Whether the District Court correctly held that the pleadings failed to state a claim for damages or injunctive relief over which it had jurisdiction or upon which any relief could be granted.

Statement of the Case

1. Nature of the Case

Plaintiff instituted the four actions which are the subject of this appeal against the Federal Aviation Administration ("FAA"), the United States Civil Service Commission ("CSC"), the Federal Bureau of Investigation ("FBI"), the Drug Enforcement Administration ("DEA") and the Veterans Administration ("VA") as well as numerous officials and/or employees of these agencies.* The grounds alleged in support of each of the actions are in essence the following: 1) that defendants have circulated false information regarding plaintiff; and 2) that the publication of this information, allegedly maintained in files kept by the respective agencies, has caused plaintiff great anguish and in particular has prevented him from obtaining employment. In each case, plaintiff seeks disclosure of the alleged files without any deletions, an injunction against further publication of the material allegedly contained therein and compensatory damages in the total amount of \$3,700,000.

* In addition to the four actions which are the subject of this appeal, a fifth action was brought by plaintiff's counsel in her own name, *Madeline De Fina v. Robert J. Drummond, et al.*, 75 Civ. 2681. The District Court in its memorandum and order of February 26, 1976, consolidated all five actions but dismissed the fifth action, 75 Civ. 2681, by reason of Ms. De Fina's failure to exhaust her administrative remedies. Ms. De Fina has not appealed from that decision.

In each case, plaintiff named as defendants not only the governmental agencies involved but also various individuals employed therein as well as various unidentified persons who allegedly were the source of the aforementioned information or were responsible for its publication, participated in its dissemination or contributed to its contents. As is explained more fully below, the motivating factor underlying these actions is plaintiff's belief that he is the victim of a conspiracy on the part of these defendants to deprive him of employment. Plaintiff has concluded that all of the agencies and/or individuals involved in the investigation of his various applications for civil service employment or consulted with respect thereto as well as those involved in the processing of his various FOIA claims are participants in the conspiracy. His objective is to expose the conspiracy and its participants and redress the damages which he has allegedly sustained in consequence thereof. Although plaintiff brought four separate actions, this description is equally applicable to the substantive allegations of and relief sought in each.

On February 26, 1976, in response to the Government's motion to dismiss the complaints pursuant to Rule 12(b) of the Federal Rules of Civil Procedure, the District Court entered a memorandum and order holding that the information not disclosed by the defendant agencies was exempt from compelled disclosure pursuant to Exemptions 5, 6 and 7 of the Act, 5 U.S.C. § 552(b)(5), (6) and (7). The only exceptions to the Court's ruling were: 1) a report of investigation prepared by the DEA, which the court requested for in camera review*: and 2) five certificates

* After review of the DEA report which had been withheld in its entirety, the District Court proposed that it be released in redacted form. Pursuant thereto, on March 23, 1976 the Government released the report as redacted by the Court (S.A. 157). The redactions involved the deletion of the identities of the individuals named therein, including both names as well as identifying characteristics.

of eligibles * prepared by the CSC, which the Government was directed to release in unexpurgated form. In addition, the District Court dismissed all common law claims of libel, slander and defamation against the federal defendants for lack of jurisdiction and for failure to state a claim. Thereafter, on the Government's motion for reargument with respect to the certificates of eligibles, the District Court issued a supplemental memorandum and order on April 19, 1976 wherein it held that the information which had been deleted from the certificates was exempt from compelled disclosure pursuant to Exemption 6 of the Act, 5 U.S.C. § 552 (b) (6). (A. 43-45) ** A final order and judgment was entered on May 20, 1976 (A 46-50).

2. Statement of Facts

These actions have arisen as a result of appellant's nonselection for several civil service employment positions for which he had made application. In January, 1971, appellant applied for a position as a Customs Se-

* When an agency has a vacancy which it wishes to fill in the competitive Civil Service, it submits a request for a list of eligibles to the CSC. The resulting list is called a Certificate of Eligibles. Each certificate contains the names of the eligibles and other identifying information as well as a numerical statement of the competitive standing of each eligible predicated upon his/her score on a competitive Civil Service examination. In their expurgated versions as released by the CSC, all information contained in the certificates with respect to each eligible other than plaintiff was deleted with the exception of the numerical statement of each eligible's competitive standing which was released (S.A. 117, 120).

** The District Court also entered two additional memoranda and orders on March 15, and April 19, 1976 (A. 36-41). Both of these memoranda, however, dealt exclusively with issues relating to the nonfederal defendants, who are also defendants-appellees on this appeal.

curity Officer with the Bureau of Customs ("Sky Marshal") and was sent to training school. A "full field" background investigation was conducted by the CSC on the request of the Bureau of Customs in connection with that application (S.A. 132). Although tentatively selected for the position, he was discharged shortly after assignment to training school because of poor eyesight. (S.A. 90).*

Thereafter, in February, 1973 appellant made application for the position of radio operator with the then existing Bureau of Narcotics and Dangerous Drugs ("BNDD"), the predecessor of the DEA, and was included in a certificate of eligibles by the CSC. He was not selected for that position, however, on the basis of the results of a preliminary background investigation conducted by BNDD agents and a second full field investigation conducted by the CSC. Appellant was notified of his nonselection by letter dated December 10, 1973 (S.A. 110, 114).

In June, 1974 appellant was included in a certificate of eligibles for a position with the FAA as an electronic technician. FAA investigators sent pre-employment inquiries under an explicit promise of confidentiality to over twenty-six previous employers listed in appellant's employment application. Three of these former employers responded that appellant had been discharged or terminated from their employment, contrary to his certified statement in his application that he had never been discharged from a prior position. Several other responses indicated a poor employment record. On the basis of these evaluations and appellant's overall employment record, the FAA declined to appoint him and another candidate from the certificate was selected (S.A. 138).

* Neither the Bureau of Customs nor the Department of the Treasury has been named as a defendant.

In each of the aforementioned investigations, by the BNDD and the FAA, appellant's former employers and co-employees as well as social acquaintances, all listed in his employment applications, were contacted by investigators of the agency involved for their assessment of his fitness for the position in question. On the basis of such assessments and the evaluative conclusions drawn therefrom, each of the agencies declined to offer appellant a civil service position.

The full field investigations twice conducted by the CSC in response to requests from the Bureau of Customs (January, 1971) and the BNDD (July, 1973) were similar in character to the preliminary investigations conducted by the BNDD and the FAA, but more extensive in scope. CSC investigators not only contacted references listed in appellant's application for federal employment but also made independent contacts with persons not necessarily named in the application such as neighbors or employees of the various educational institutions which appellant had attended. In addition, information was gathered from credit bureaus and law enforcement and investigative agencies such as local police departments and the FBI. Any information gathered from these sources was included in appellant's investigative file. Upon completion of each full field investigation, a report was prepared by the CSC and forwarded to the agency which had requested the investigation for its use in evaluating his suitability for employment. (S.A. 133).

It is important to note that the sole purpose of each of these full field investigations by the BNDD and FAA was to evaluate appellant's qualifications for various sensitive civil service positions as a result of his applications for federal employment. In each instance, after his initial certification of eligibility by the CSC, his suitability was investigated according to the customary procedures of the agency involved. On the basis of the results of

each such investigation, appellant was passed over in favor of another applicant who in the judgment of the agency was more qualified.

As a result of these setbacks, appellant has apparently concluded that he is the victim of a conspiracy on the part of the federal appellees to deprive him of his right to employment and various civil rights by resorting to "a wrong, false and malicious libel" of his character and reputation. In an effort to expose this alleged conspiracy appellant has sought, pursuant to the FOIA, unexpurgated copies of the investigative files maintained by the aforementioned federal agencies pertaining to him.

The circumstances surrounding the action wherein the FBI and its director were named as defendants arouse out of a different context.* Appellant's counsel, who is also his sister, had been the subject of an inquiry by a Grievance Committee of the United States Court of Military Appeals which apparently led to her disbarment from that Court on February 17, 1960. It was apparently this proceeding that provoked appellant into making an allegedly threatening phone call to the Court of Military Appeals which is the subject of the records released by the FBI in edited form. Special agents of the FBI conducted interviews of both appellant and his counsel regarding the alleged telephone call and both admitted placing long distance calls to the Court of Military Appeals but denied making any threats. After further investigation, it was determined that prosecution of appellant was not warranted and the investigation was terminated (S.A. 129-131).

By letter dated February 19, 1975, appellant through his counsel requested "his file under the Freedom of In-

* Richard J. De Fina v. Clarence M. Kelley, et al., 75 Civ. 2119.

formation Act" from the New York Regional Office of the CSC ("CSC New York") (S.A. 122-123). In response thereto, CSC New York released a complete copy of its file maintained with respect to appellant. Among the items released were copies of all certificates in which appellant had been included as well as an objection filed with CSC New York by the FAA in support of its non-selection of appellant as an electronic technician.* The only deletions made in this material were of other names and identifying information included in the certificates as well as the names of appellant's former employers whose response to the employment inquiries of the FAA were cited in the objection. In addition, the names of two FAA employees whose evaluations of telephone conversations with appellant were cited in the Objection were similarly deleted. (S.A. 120).

On March 24, 1975, appellant appealed the decision of CSC New York regarding his request and demanded a hearing with respect to his non-selection by the FAA for the position of electronic technician. In response to this appeal, by letter dated May 9, 1975, the CSC released an edited copy of appellant's investigative file developed as a result of the two full field investigations conducted by the CSC in 1971 and 1973. The material released included the following:

- 1) Request to conduct Full Field investigation dated 7-10-73
- 2) Report of National Agency Check dated 11-10-73
- 3) 4 CSC Reports of Investigation (1973)

* As is explained more fully in the affidavit filed by CSC-New York, where a civil service eligible with veterans preference status is passed over in favor of an eligible without such status, the appointing agency must file an objection and statement of reasons with the CSC, which in turn must be sustained by the CSC (S.A. 117-121). Appellant has veterans preference status.

- 4) Request to conduct Full Field investigation dated 1-13-71
- 5) Request to cancel Full Field investigation dated 2-10-71
- 6) Report of National Agency Check dated 2-22-71
- 7) 6 CSC Reports of Investigation (1971)

(S.A. 134).

The only deletions in this copy were of the names and other identifying characteristics of those persons who had been interviewed by CSC investigators in the course of the full field investigations, either independently or by reason of such persons having been included as references in appellant's applications for civil service employment. The names of the CSC investigators were similarly deleted. In addition, certain intra-agency evaluative and transmittal memoranda written by CSC investigators were not included in the copy of the investigative file released to appellant. These internal memoranda did not constitute part of the final report submitted to the requesting agency and any factual material contained therein was also contained in the investigative reports which were released and upon which the internal memoranda were predicated (S.A. 134).

The CSC investigative file also included the memorandum prepared by the FBI in connection with the aforementioned extortion investigation. As to this memorandum, appellant's FOIA request was referred to the FBI and appellant was so notified. By letter dated April 30, 1975, the FBI released an edited copy of the memorandum (S.A. 128). The only deletions were of the identities of individuals other than appellant named therein as well as substantive information regarding these individuals which might have otherwise led to their circumstantial identification.

Appellant's counsel made an independent request in her own behalf to the CSC by letter dated August 8, 1975. In response thereto, on August 22, 1975 the CSC released to Ms. DeFina three additional documents. These documents which were contained in appellant's investigative records and resulted from his full field investigation conducted in 1971 constitute the only information relating to Ms. DeFina in the files of the CSC. The only deletions made therein were of the initials of the CSC personnel who prepared them. These documents were not released to appellant because aside from the designation of the subject of investigation their substantive content pertained exclusively to Ms. DeFina (S.A. 135).

By letters dated February 19, March 8 and March 24, 1975, appellant requested of the Eastern Regional Office of the FAA ("FAA Eastern") that it release copies of certain records pertaining to him. In response to these requests, FAA Eastern released copies of the following records (S.A. 139-140):

- 1) Two Interview Records.
- 2) Three Medical Releases (signed by appellant).
- 3) Copy of Telegram to the VA of January 13, 1975 requesting appellant's medical record.
- 4) Copy of VA letter of March 10, 1975 advising that appellant had withdrawn his medical authorization.

FAA Eastern declined to release copies of appellant's medical records which it had received from the VA, because such records were deemed to belong to the VA and were accordingly returned to that agency. FAA Eastern also withheld the employment inquiries which had been sent to appellant's former employers listed in his employment application and returned with their evaluations. However, in response to an administrative appeal of the

FAA Eastern decision, the FAA released these inquiries. The only deletions made therein were of the names of the responding employers (S.A. 140).

Appellant made a third FOIA request on February 19, 1975, this one directed to the DEA. In response to this request, the DEA released copies of its records pertaining to appellant including the following (S.A. 111-112):

A) Appellant's Personal Qualifications Statement filed with the CSC on September 6, 1972;

B) Correspondence between the BNDD and appellant or his counsel;

C) Appellant's "Security Investigations Data For Sensitive Positions" application filed with the BNDD on March 19, 1973;

D) Recommendations submitted by appellant's acquaintances and former employers and academic instructors in support of his application for employment; and

E) Correspondence between the BNDD and Congressman Benjamin S. Rosenthal regarding appellant's application for employment.

The only material withheld by the DEA was various internal evaluative and transmittal memoranda including file notations of telephone conversations between DEA personnel and appellant or his counsel as well as the report of investigation evaluating the results of the BNDD's preliminary background investigation of appellant.* In addition, the names of BNDD personnel were deleted from its correspondence with Congressman Rosen-

* As explained above (p. 4), the DEA report of investigation was thereafter released in expurgated form on March 26, 1975.

thal who had written the agency in support of appellant's employment application.* The decision of the DEA regarding appellant's request was upheld by Attorney General Levi on April 30, 1975 (S.A. 115-116a).

Finally, by letter dated March 8, 1975, appellant requested the following information from the VA:

"Copies of all communications you have ever had with any person, agency or other in which there was a demand for my medical records and if such demand was made, copies of said demand and if any record was ever sent then a copy of what matter was ever sent out." (S.A. 150).

On April 15, 1975 the VA released copies of all communications which the VA had received from the FAA regarding appellant as well as a letter to the FAA, dated March 10, 1975, advising the FAA that appellant had cancelled his authorization to release his medical records. On July 23, 1975, the Government released a complete and unedited copy of appellant's military medical records a similar copy of which had been sent earlier to the FAA at the latter's request (S.A. 152).

* The DEA inadvertently omitted one document from the released material, a memorandum request to the CSC for full field investigations of the individuals named therein including appellant. This error was discovered during the preparation of the Government's motion to dismiss in the District Court and by letter dated July 2, 1975, the document was released. The names of the other individuals were deleted. (S.A. 112).

Summary of Argument

Nature of the Information in Dispute

The primary thrust of the actions which are the subject of this appeal is appellant's claim for relief under the FOIA. Each of the defendant-appellee agencies has submitted comprehensive affidavits regarding what documents were released to appellant and what documents or selective information therein were withheld (S.A. 110-153). In addition, the affidavits describe the context in which such records were developed. However, in view of the number of agencies involved and different materials released, it would be helpful to generalize as to the purpose and function of the files as well as the nature of the documents that were withheld and the information that was deleted from those documents that were in fact disclosed.

Each of the agencies with the exception of the FBI and the VA developed investigative files pertaining to appellant as a result of their respective investigations of his civil service employment applications. Accordingly, there are three files in dispute:

- 1) The DEA's investigative file resulting from its preliminary background investigation in 1973;
- 2) The FAA's investigative file resulting from its preliminary background investigation in 1974; and
- 3) The CSC investigative file resulting from its two full field investigations conducted in 1971 and 1973.

The only FBI record at issue is the memorandum of investigation which had been contained in the CSC file and

was released in expurgated form in response to appellant's FOIA request to the CSC. There is no longer any FOIA issue with respect to the VA in view of the release by the Government of a complete and unedited copy of appellant's military medical records on July 23, 1975.

Each of these files has been completely disclosed to appellant except for the following:

1. *Internal Memoranda.* These documents are evaluative and transmittal memoranda written by the investigating agent for other officials within the agency during the course of investigation (S.A. 112, 134). Withheld internal memoranda are found only in the CSC and DEA files. Since the CSC and the DEA have released copies of their reports of investigation and national agency checks without any deletions of substantive content and the internal evaluative memoranda were based upon these reports, any information contained in the memoranda other than the investigator's opinion was also contained in the reports which were in fact released.

In addition to these evaluative memoranda, the undisclosed internal memoranda also include file notations made by agency employees of their telephone conversations with appellant and/or his counsel as well as transmittal memoranda which do not contain any substantive information.

2. *Identity of Sources.* Each of the agencies deleted the names of the persons who had been interviewed or otherwise volunteered information in response to the inquiries of agency investigators. In addition to the names themselves, identifying information within the body of the material released—e.g. the exact location of a neighbor's residence—were also deleted to prevent indirect or circumstantial identification of the persons involved on the basis of such information. With respect to appellant's former employers, the CSC and the DEA in their reports of investigation disclosed the names of the companies

where he had been previously employed and which had provided information, and deleted only the names of the individuals within the companies who had been interviewed or otherwise given the information. The FAA, however, deleted the names of the companies which responded to its employment inquiries. The reason for this distinction is that CSC and DEA investigators contacted particular individuals within the companies and reported their individual opinions. The FAA, on the other hand, addressed its employment inquiry forms to the companies themselves under an express promise of confidentiality and it was in that company capacity that the inquiries were answered.

3. *Identity of Agency Investigators.* All agencies deleted the names of their personnel who had participated in the investigations from the various documents that were released.

Background of the FOIA

The primary purpose of the FOIA is "to increase the citizen's access to Government records." *Bristol-Myers Co. v. Federal Trade Commission*, 424 F.2d 935, 938 (D.C. Cir.), *cert. denied*, 400 U.S. 824 (1970). In *Environmental Protection Agency v. Mink*, 410 U.S. 73 (1973), the Supreme Court authoritatively set forth the general considerations which should guide the federal courts in interpreting and applying the Act. The Court in *Mink* emphasized that it was designed to make available to the public all official information shielded unnecessarily from public view. At the same time the Court recognized the Congressional determination that Government operations could not be conducted effectively unless certain types of Governmental records were kept confidential. As the Court stated, 410 U.S. at 80:

Subsection (b) [the exemptions] is part of this scheme and represents the congressional deter-

mination of the types of information that the Executive Branch must have the option to keep confidential, if it so chooses. As the Senate Committee explained, it was not "an easy task to balance the opposing interests, but it is not an impossible one either . . . Success lies in providing a workable formula which encompasses, balances, and protects all interests, yet places emphasis on the fullest responsible disclosure." S. Rep. No. 813, p. 3. [Footnote omitted]

Thus, while the underlying philosophy of the Act establishes a policy of full agency disclosure except where exempted by statute, the exemptions reflect an equally important policy that in the interest of effective Governmental operation and hence the public interest, information falling within their scope need not and should not be disclosed.

The District Court properly held that the information deleted by the appellee agencies from the material already released to appellant falls squarely within each of the aforementioned statutory exemptions upon which the Government relies and that compelled disclosure would preclude effective investigation of prospective Governmental employees including those being considered for sensitive positions. Because the quality of Governmental service would thereby diminish, the resulting harm would fall not only on the Government but inevitably upon the public as well, whose interest the Act was intended to further. Finally, because the information which appellant seeks is the names of persons who have come forward with information in the context of investigations of appellant as a civil service applicant as well as the names of Governmental employees who have conducted such investigations, disclosure of their identities would constitute a clearly unwarranted invasion of their privacy.

ARGUMENT

POINT I

The District Court correctly held that the information withheld by the appellee agencies is exempt from compelled disclosure pursuant to Exemption 5 of the FOIA, 5 U.S.C. § 552(b)(5).

The purpose of Exemption 5 is the protection of internal communications such as advice, recommendations, opinions or other material reflecting the deliberative or policy-making process as opposed to purely factual or investigatory reports. *Brockway v. Department of Air Force*, 518 F.2d 1184 (8th Cir. 1975); *Soucie v. David*, 448 F.2d 1067 (D.C. Cir. 1971). See also *EPA v. Mink*, *supra*, at 85-91; *International Paper Co. v. Federal Power Commission*, 438 F.2d 1349, 1358-59 (2d Cir.), *cert. denied*, 404 U.S. 827 (1971); *Wu v. National Endowment For Humanities*, 460 F.2d 1030, 1032 (5th Cir. 1972), *cert. denied*, 411 U.S. 926 (1973); *Sterling Drug Inc. v. F.T.C.*, 450 F.2d 698, 705 (D.C. Cir. 1971).

Exemption 5 protects in the FOIA context the executive privilege protecting predecisional communications because "the frank discussion of legal and policy matters" in writing might be inhibited if the decisions were made public and the ensuing decisions would be poorer as a result. *N.L.R.B. v. Sears, Roebuck & Co.*, 421 U.S. 132, 150 (1975) quoting from S. Rep. No. 813, p. 9, 89th Cong. 1st Sess. (1965); *EPA v. Mink*, *supra*, at 87. As one Court stated, "there are enough incentives as it is for playing it safe and listing with the wind." *Ackerley v. Ley*, 420 F.2d 1336, 1341, (D.C. Cir. 1969). And as the Supreme Court recently emphasized, "[h]uman experience teaches that those who expect public dissemination of their remarks may well temper candor with a concern for ap-

pearances . . . to the detriment of the decision-making process." *United States v. Nixon*, 418 U.S. 683, 705 (1974) (regarding the claim of executive privilege).

In determining whether particular information should be protected by Exemption 5, the Court must consider both the Government's claim of privilege and appellant's demand for full disclosure from the perspective of the purposes and goals of the FOIA and this specific exemption. These counter-balancing policies have been described as:

"(1) the dissemination of useful information to the public—both in order to satisfy the needs of individuals for the information and in order to instill a sense of responsibility in the agency that realizes it can no longer hide its mistakes—and (2) the protection from inhibition of the free flow of information and free discussion within the agency."

Brockway v. Department of the Air Force, *supra* at 1193, quoting with approval from Note, *The Freedom of Information Act and the Exemption for Intra-Agency Memoranda*, 86 Harvard L. Rev. 1047, 1052-1053 (1973). As where information is sought directly pursuant to the federal rules of discovery, the application of this exemption involves a balancing by the Court requiring the party seeking the information to show "necessity sufficient to outweigh the adverse effects the production would engender." *Carl Zeiss Stiftung v. V.E.B. Carl Zeiss, Jena*, 40 F.R.D. 318, 328-29 (D.D.C. 1966), *aff'd sub nom*, *V.E.B. Carl Zeiss, Jena v. Clark*, 384 F.2d 979 (D.C. Cir.), *cert. denied*, 389 U.S. 952 (1967). See *International Paper Co. v. F.P.C.*, *supra* at 1358-59; *Boeing Airplane Co. v. Coggeshall*, 280 F.2d 654, 662 (D.C. Cir. 1960). *Gillman v. United States*, 53 F.R.D. 316 (S.D. N.Y. 1971); *O'Keefe v. Boeing Company*, 38 F.R.D. 329, 334 (S.D.N.Y. 1965); The test is whether a 'private

party'—not necessarily the applicant—would *routinely* be entitled to the material through discovery. *Sterling Drug Inc. v. F.T.C.*, *supra* at 704, n.4 (D.C. Cir. 1971); *Soucie v. David*, *supra* at 1077.

Viewed in light of these criteria, it is clear that appellant is not entitled to the withheld information and that its compelled disclosure would thwart the Congressional policy of protecting the free flow of information and discussion into and within Governmental agencies. The internal memoranda are protected by Exemption 5 in that their scope and purpose was to communicate interim recommendations or evaluations from agency investigators to various agency officials whose responsibility it was to approve or reject appellant's employment applications. As we have shown above, any factual material contained therein was also included in the documents which were in fact released and upon which the memoranda were based. Moreover, in each of the instances in which appellant was passed over for civil service employment (radio operator with the DEA and electronic technician with the FAA), he was given a statement of the reasons for the agency decision (S.A. 111, 138). Accordingly, appellant has already received not only the factual material contained in his investigative files but also the substance of any interim recommendations contained therein which were in fact adopted by the agency.

These criteria similarly dictate that the names of outside sources who were consulted by agency personnel in the course of their investigations must also be protected from compelled disclosure. Persons consulted for their evaluation of a job applicant's fitness for civil service employment are likely to temper their candor for the sake of appearance if confronted with the prospect that their respective identities may thereafter be revealed to the applicant in question. Considering the overwhelming pub-

lic interest in the unqualified fitness of Civil Service personnel, particularly those employed in sensitive positions such as the ones for which appellant was considered, it is clear that the decision making process underlying the selection of civil service applicants must not be impeded.

Thus in *Wu v. National Endowment for Humanities*, *supra*, a Government foundation consulted noted sinologists outside the agency for assistance in evaluating the merits of a research grant application. When the applicant's petition was rejected, he sued under the FOIA to compel disclosure of the advisory memoranda submitted by the scholarly consultants. The Fifth Circuit affirmed the district court's refusal to order disclosure of the documents and extended the protection of Exemption 5 to the outside consultants on the ground that the memoranda sought, although inevitably containing some factual material, were primarily expressions of opinion to assist the agency in reaching a decision and therefore not discoverable. The Court felt that the consultants' opinions must remain confidential lest the consultants be subjected to incessant brow-beating by a disgruntled researcher. If such opinions were disclosed, the fear of publicity might exert a chilling effect on their future judgments. *Id.* at 1032. See *Note, The Freedom of Information Act: A Seven-Year Assessment*; 74 Columbia L. Rev. 895, 941 (1974). See also *Kent Corp. v. N.L.R.B.*, 530 F.2d 612 (5th Cir. 1976); *Soucie v. David*, *supra* at 1078 n.44.

The interpretation of Exemption 5 stated in *Wu* is equally applicable hereto. Indeed, the facts of these cases militate even more strongly in favor of non-disclosure since appellant has already obtained the factual material contained in the agencies' investigative files with appropriate deletions only of the identities of the persons contacted. Having done so, the agencies are surely entitled to withhold the identities of the persons con-

tacted in order that such persons not be subject to the threat of harassment in retribution for their candor. Compelled disclosure of their identities would inevitably inhibit their candor and objective judgment and that of any person who hereafter may be asked to volunteer information or opinion regarding the fitness of a civil service applicant.

Exemption 5 also protects the identities of Governmental employees who participated in the background investigations conducted by the agencies. The names of such individuals are of no legitimate use to appellant inasmuch as he has already obtained the factual information contained in the agency records which he would need in order to challenge its accuracy or the resulting decisions not to offer him a civil service position. The identity of the personnel who participated in the investigations is irrelevant to both the accuracy of the information or the integrity of the resulting agency decisions. Moreover this is not a situation wherein absent such information, any agency could "hide its mistakes" since the agency bears and assumes responsibility for its decisions, and appellant has obtained the substantive information upon which such decisions were predicated. Any mistake would be shown by challenging the accuracy of the underlying information, not the individuals who assembled it. Thus, nondisclosure of the names of these individuals would have no great bearing on either the purported needs of the appellant or the sense of responsibility of the agencies involved.

Government employees conducting such investigations are entitled to some protection from harassment or vexatious lawsuits from disgruntled civil service applicants. They, no less than outside consultants, should be permitted to freely perform their respective functions without fear that they may be subject to harassment by reason of their

candor. Inasmuch as it is the agency which makes and is responsible for the final decision, and is therefore answerable to those who challenge it, individual employees should not be singled out because of the mistaken and unfounded assumption that they should in fact be held responsible.

While we have found no factually analogous case dealing with the rights of Governmental employees, the reasoning of several cases dealing with Exemption 5 supports nondisclosure of their identity. Thus in *Montrose Chemical Corporation v. Train*, 491 F.2d 63 (D.C. Cir. 1974), the plaintiff sought disclosure of staff summaries and analyses of factual evidence adduced at a public hearing before the Environmental Protection Agency which were used by its administrator in preparing his final order in the proceeding. Although the staff summaries incorporated wholly factual material, it was already available in the public record of the hearing. The documents were therefore held to be exempt from compelled disclosure on the ground that the "consultative functions" of the agency officials must be protected:

Our solution rests on the interpretation of the purpose of exemption 5. If the exemption is intended to protect only deliberate *materials* then a factual summary of evidence on the record would not be exempt from disclosure. But if the exemption is to be interpreted to protect the agency's *deliberative process*, then a factual summary prepared to aid an administrator in resolution of a difficult, complex question would be within the scope of the exemption. [Emphasis in original] *Supra* at 68.

See also *Sterling Drug, Inc. v. FTC*, *supra*.

The interpretation of Exemption 5 set forth in *Montrose* dictates that the identities of governmental em-

ployees at issue herein similarly fall within the scope of the Exemption. While admittedly the governmental process involved herein is primarily investigative, its purpose-is to provide input into the agency's evaluation of an applicant's qualifications and whether he is suitable for civil service employment. Such determination is ultimately deliberative. Moreover, the documents in the instant cases were in fact released whereas in *Montrose* they were withheld entirely. Appellant has therefore received all the factual information contained therein. Accordingly, he is in the same position as was the plaintiff in *Montrose* who similarly had access to the desired factual information by reason of its being simultaneously included in the public record of the hearings.

Finally, the policies that Exemption 5 was meant to preserve are well illustrated by appellant's motives for seeking to compel disclosure of the identities of the outside individuals who were consulted and the Government personnel who conducted the background investigations. Appellant claims that he needs the identity of these individuals in order to establish their hostility and prejudice and that they are participants in a conspiracy to deprive him of his constitutional rights. Thus, appellant's objective is to probe their mental processes and motives rather than the objective legal validity of the various decisions not to offer him employment.

Such an effort is inconsistent with the basic principle of administrative law that it is not the function of the Court to probe mental processes underlying governmental decisions. *Kent Corp. v. N.L.R.B.*, *supra* at 620. See *Morgan v. United States*, 304 U.S. 1, 18 (1938); *Montrose Chemical Corp. v. Train*, *supra*. Although "any person" has the same rights under the Act as any other person, it is equally well established that Exemption 5 was enacted to free decision-makers from the "threat of cross-examina-

tion" in a public tribunal. *Ackerley v. Ldy, supra*, at 1341. See *EPA v. Mink, supra* at 92-93. In view of appellant's stated objectives, it is hardly speculative to say that both the outside consultants as well as the agency personnel who conducted the investigations would be exposed to just such threats if their identities were disclosed. "A court which does not consider probing mental processes part of its reviewing task will hardly read [Exemption 5's] language as requiring disclosure of documents for solely that purpose." * Pederson, *Formal Records and Informal Rule Making*, 85 Yale J. 38, 84 (1975). See generally *Kent Corp. v. N.L.R.B., supra* at 620-621.

* In *Kent Corp. v. N.L.R.B., supra*, the Fifth Circuit distinguished the exceptions to the *Morgan* ban on probing mental processes in the context of Exemption 5 as follows:

There are circumstances in which the *Morgan* ban on probing mental processes of agencies does not apply: most notably, where a 'strong [preliminary] showing of bad faith or improper behavior' has been made. *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 420, 91 S.Ct. 814, 825, 28 L.Ed 2d 136, 156 (1971); see also *KFC National Management Corp. v. NLRB*, 497 F.2d 298 (C.A. 2, 1974). . . . But, as Pederson continues, '[t]he bad faith or improper conduct exception to the protection afforded by *Morgan* in judicial review has not yet been read into the . . . exemption.' 85 Yale L.J. at 84. In this case we need not decide the somewhat different question of whether a substantial showing of agency bad faith, of a kind that normally would make pre-decisional documents 'available by law to a party other than an agency in '[civil] litigation with the agency,' § 552(b)(5), will also make those documents available to 'any person' through the FOIA. For here *Kent's* charges of impropriety were simply too flimsy to meet the *Overton Park* standard.

Kent Corp. v. N.L.R.B., supra at 621, n.21. This distinction is equally applicable to appellant's charges herein.

POINT II

The District Court correctly held that the identities of agency personnel and outside consultants are also protected from compelled disclosure by exemption 6 of the Act, 5 U.S.C. § 552(b)(6).

Exemption 6 exempts from compelled disclosure "personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy. . . ." 5 U.S.C. § 552(b)(6). The decision of the District Court that deletion of 1) the identities of outside persons and/or companies consulted by agency personnel in the development of the background investigations and 2) the names of agency personnel who conducted these investigations is a correct and equitable application of Exemption 6 under the circumstances of this case and should therefore be sustained by this Court.

The purpose of Exemption 6 is to strike a balance between the right of privacy of affected individuals against the right of the public to be informed with respect to the contents of files falling within the scope of the exemption. *Getman v. N.L.R.B.*, 450 F.2d 670, 674 (D.C. Cir. 1971). As explained in the legislative history:

The phrase 'clearly unwarranted invasion of personal privacy' enunciates a policy that will involve a balancing of interests between the protection of an individual's private affairs from unnecessary public scrutiny, and the preservation of the public's right to governmental information. The application of this policy should lend itself particularly to those Government agencies where persons are required to submit vast amounts of personal data usually for limited purposes. * * * Senate Rep. 813 at 9, 89th Cong. 1st Sess. (1965).

Application of this Exemption requires that the Court "balance a public interest purpose for disclosure of personal information against the potential invasion of individual privacy". [Emphasis added] *Getman v. N.L.R.B.*, *supra* at 677 n. 24; *Wine Hobby USA, Inc. v. United States Internal Revenue Service*, 502 F.2d 133, 136 (3rd Cir. 1974). In so doing, the court must exercise a large measure of equitable discretion. *Rose v. Department of Air Force*, 495 F.2d 261, 269-70 (2d Cir. 1974), *aff'd* 425 U.S. 352 (1976); *Getman v. N.L.R.B.*, *supra*.

Before carrying out the required balancing of interests, however, the threshold inquiry must be whether the records in question are personnel and medical files or similar files within the meaning of Exemption 6. Inasmuch as the records were developed pursuant to background investigations of appellant's fitness for civil service employment, it is logical to conclude that they fall within the ambit of "personnel and . . . and [or] similar files." Moreover, the information contained therein has the same characteristics of confidentiality that ordinarily attach to information contained in medical or personnel files. As was stated in *Robles v. Environmental Protection Agency*, 484 F.2d 843, 845 (4th Cir. 1973):

The term 'similar' was used, it seems, to indicate that, while the exemption was not limited to strictly medical or personnel files, the files covered in this third category must have the same characteristics of confidentiality that ordinarily attach to information in medical or personnel files; that is, to such extent as they contain 'intimate details' of a 'highly personal' nature, they are within the umbrella of the exemption. . . . It would seem to follow that the exemption applies only to information which relates to a specific person or individual, to 'intimate details' of a 'highly personal nature' in that individual's employment record or health history or the like.

As is evident from the records already released, they contain almost exclusively highly personal information which relates specifically to appellant and which has been held in strict confidence within the confines of the agencies which gathered it or which requested that it be gathered for use in evaluating his fitness for employment. Such information falls squarely within the definition of information of a "highly personal nature" as contemplated in Exemption 6. See also *Wine Hobby USA, Inc. v. United States Internal Revenue Service*, *supra* at 135.

Although Exemption 6 was intended primarily to protect the privacy of individuals concerning whom the Government has assembled detailed records—See H. Rep. 1497, 89th Cong., 2d Sess. 11 (1966), U.S. Code Cong. & Admin. News, p. 2418—its protection extends to any person whose privacy interest would be adversely affected by disclosure so long as the "personal quality of information in the file" is sufficient to invoke the Exemption. *Wine Hobby USA, Inc. v. United States Internal Revenue Service*, *supra* at 135. A more restrictive interpretation would subvert the purpose of the Exemption inasmuch as protection of the integrity of such files requires recognition not only of the privacy of those about whom intimate information has been gathered but also the identity of those who have volunteered such information under an assumption of confidentiality. Moreover, appellant's claim of entitlement may not be predicated upon the fact that the files pertain to him. The purpose of the FOIA is to increase public access to government records by providing a right of access to "any person" without "consideration of the interests of the party seeking relief." *Soucie v. David*, *supra* at 1077; *Nixon v. Sampson*, 389 F. Supp. 107, 121 (D. D.C. 1975).

Having thus established that the records at issue are within the scope of Exemption 6, the inquiry becomes whether disclosure would constitute a "clearly unwar-

ranted invasion of personal privacy". As pointed out by this Court, these words are a wholly conclusory phrase:

[w]hich requires a court to apply the statutory standard without any definite guidelines. * * * Each case involves an essentially unique investigation into the nature of the privacy interest invaded and the extent of the proposed invasion, viewed in the light of contemporary mores and sensibilities as applied to the particular facts. *Rose v. Dept. of Air Force*, 495 F.2d at 266. [Emphasis added]

Disclosure of the identities of persons and/or companies who voluntarily responded to the inquiries of agency investigators would constitute a clearly unwarranted invasion of their personal privacy. First, such inquiries were made either under an express promise of confidentiality (e.g. the FAA employment inquiries) or at least under circumstances which warranted a presumption of confidentiality. While such promise of confidentiality does not of itself necessarily mandate nondisclosure, under the circumstances of these cases it should be honored. Indeed, judging from the numerous unfounded and frivolous allegations contained in these actions, one cannot but suspect that the results of disclosing the identities of these persons would be to subject them to incessant harassment or vexatious litigation.

This is not a situation in which the persons who have contributed to the investigations and whose privacy interest is at stake have any personal interest in the outcome of the investigations or any duty to respond to the agency inquiries. They do so only for the sake of the public interest in the high quality of civil service personnel. To disclose the identities of such persons would not only thwart the effectiveness of future investigations of civil service applicants and hence the public interest,

but would also constitute a clearly unwarranted invasion of the privacy of those who have served the public interest by contributing candid information or opinions to those investigations.

The reasoning of several cases interpreting Exemption 6, if applied to the instant case, would mandate nondisclosure. In *Getman v. N.L.R.B.*, *supra*, two law professors engaged in an NLRB voting study brought an action to compel the agency to disclose the names and addresses of employees eligible to vote in certain union elections. The Court of Appeals for the District of Columbia held that the information should be disclosed. However, this decision was reached only after finding that: 1) Disclosure would not entail an impermissible intrusion into privacy since it would subject the named employees to nothing more than a telephone request to submit to a voluntary interview; 2) The purpose of the study was to suggest much needed improvements of NLRB regulations governing the union electoral process and that:

The public interest need for such an empirical investigation into the assumptions underlying the Board's regulation of campaign tactics has for some time been recognized by labor law scholars. [Footnote omitted]. *supra* at 675-6;

and 3) The names were essential to the study and that plaintiffs had no alternative sources for obtaining them.

Application of these criteria to the circumstances of this case demonstrates that disclosure is clearly unwarranted. First, the manifold allegations of injury, criminal conspiracy, etc. herein lead to the inevitable conclusion that disclosure would subject both the outside sources as well as the agency investigators to similar harassment and vexatious lawsuits. Second, there is no

public interest purpose in disclosure. Third, appellant has already obtained all the information which would arguably be necessary to challenge his nonselection. Thus, whereas in *Getman* the Court found that the public interest would be served by disclosure and that the resultant invasion of privacy would be minimal, here the public interest would be harmed by disclosure and the resultant invasion of privacy substantial and therefore clearly unwarranted.

The agency personnel who conducted the investigations and whose names have been withheld also have an expectation of privacy which under the circumstances of this case should also be protected. Admittedly Government personnel do not have the same expectation of privacy as do outside sources or consultants who have no obligation to respond to investigative inquiries and who do so presumably upon an explicit or implicit promise of confidentiality. However, they too have a right to be protected from harassment or recrimination which must be considered in the balancing of interests required by Exemption 6. Where, as here, the public interest purpose of nondisclosure is minimal, the interest of the agency personnel in protection from an unnecessary and clearly unwarranted invasion of their personal privacy should be protected.

POINT III

The District Court correctly found that the identities of the eligibles other than appellant are protected from compelled disclosure by Exemption 6 of the Act, 5 U.S.C. § 552(b)(6).

In its decision of April 19, 1976, the District Court held that disclosure of the identities of the individuals listed in the certificates other than appellant would con-

stitute a clearly unwarranted invasion of their privacy (A. 43-44). This decision is a correct and equitable application of Exemption 6 under the circumstances of this case and should therefore be sustained by this Court.

As above, the threshold inquiry is whether the records in question, herein the certificates, are "personal and medical files and [or] similar files" within the meaning of the Exemption.*

Inasmuch as the certificates were prepared in anticipation of Civil Service employment and contain the respective levels of eligibility of the various individuals listed therein, we submit that they fall within the ambit of "personnel or similar files." Moreover, to hold otherwise would preclude inquiry into the more important question of whether release of the information contained therein would constitute a clearly unwarranted invasion of personal privacy.

* The function of the certificates and the nature of the information contained therein is of course critical to this determination. When a federal agency has a vacancy which it wishes to fill from within the competitive Civil Service, it submits a request for a list of eligible candidates to the CSC. The resulting list of eligibles is called a "certificate". The information contained on these certificates includes the name, address, telephone number and CSC identification number of each eligible as well as his date of registration with the CSC and the grade and option number of his registration. In addition, for each eligible there is included a numerical statement of his competitive standing within the Civil Service based upon his score on a competitive Civil Service examination. All information contained therein with respect to each eligible other than appellant was deleted from the copies released with the exception of the numerical statement of each eligible's competitive standing which was included. Appellant was thus able to ascertain his relative standing among all of the eligibles listed on the respective certificates notwithstanding that all identifying information with respect to each such eligible was in fact deleted (S.A. 120).

Precedent for his approach and characterization of the files may be found in the analogous case of *Wine Hobby USA, Inc. v. United States Internal Revenue Service*, *supra*, in which a corporation sought to obtain the names and addresses of all persons within a certain region who had registered with the United States Bureau of Alcohol, Tobacco and Firearms to produce wine for family use. The Third Circuit held that the list of names and addresses was a file similar to the personnel and medical files specifically referred to in the exemption on the ground that:

A broad interpretation of the statutory term to include names and addresses is necessary to avoid a denial of statutory protection in a case where release of requested materials would result in a clearly unwarranted invasion of personal privacy. Since the thrust of the exemption is to avoid unwarranted invasions of privacy, the term 'files' should not be given an interpretation that would often preclude inquiry into this more crucial question. Furthermore, we believe the list of names and addresses is a file 'similar' to the personnel and medical files specifically referred to in the exemption. The common denominator in 'personnel and medical and similar files' is the personal quality of information in the file, the disclosure of which may constitute a clearly unwarranted invasion of personal privacy. We do not believe that the use of the term 'similar' was intended to narrow the exemption from disclosure and permit the release of files which would otherwise be exempt because of the resultant invasion of privacy. [Footnote omitted] *supra* at 135.

See also, in *Getman v. N.L.R.B.*, *supra* at 675.

The identity of the other eligibles listed in the certificates, if considered in conjunction with the already released statements of their competitive standing within the Civil Service, constitutes information of a sufficiently similar personal quality to fall within the ambit of Exemption 6.

Having found that the certificates are within the scope of Exemption 6, the District Court correctly concluded that disclosure of the certificates in unpurgated form would constitute a clearly unwarranted invasion of the personal privacy of the eligibles listed therein. The individuals listed in the certificates are entitled to retain the anonymity of their identity and place of residence. To say the least, absent a compelling public interest purpose, individuals seeking Civil Service employment should not be compelled to relinquish that right in order to register with the CSC and be considered for such employment. As the Third Circuit observed in *Wine Hobby*:

"[T]here are few things which pertain to an individual in which his privacy has traditionally been more respected than his own home. Mr. Chief Justice Burger recently stated:

The ancient concept that 'a man's home is his castle' into which 'not even the king may enter' has lost none of its vitality. . . .

Rowan v. United States Post Office Dept., 397 U.S. 728, 737, 90 S.Ct. 1484, 1491, 25 L.Ed. 2d 736 (1970). Disclosure of the requested lists would involve a release of each registrant's home address, information that the individual may fervently wish to remain confidential or only selectively released. One consequence of this disclosure is that a registrant will be subjected to

unsolicited and possibly unwanted mail from Wine Hobby and perhaps offensive mail from others.”
[Footnotes omitted] *Supra* at 137.

The invasion found to be unacceptable in *Wine Hobby* would be even more egregious herein where not only the home address and telephone number would be released but also each individual's competitive standing within the Civil Service. Such individuals may well be desirous of withholding such information so that it may not be a potential barrier to employment outside the private sector. Individuals who are unable to obtain federal employment because of their low competitive standing based upon the Civil Service examination may also be penalized in the non-federal sector where potential employers might simply use that standing as a measure of their ability without affording any independent opportunity to demonstrate competence.

Moreover, the CSC regulations explicitly provide that the information contained in the certificates is not available to the public. See 5 C.F.R. § 294.501(e). Accordingly, it is reasonable to conclude that persons registering with the CSC for employment consideration do so with the expectation that based upon this regulatory representation, such information will remain confidential.

Balancing the seriousness of this invasion of privacy against the public interest purpose, if any, to be served by disclosure demonstrates that the invasion would be clearly unwarranted. Indeed, we can discern no public interest whatsoever that would be served by disclosure. On the contrary, the only interest that is alleged throughout the manifold documents submitted by appellant in the District Court is his claim that he is the victim of a conspiracy on the part of the Government to deprive him of his right to employment and various civil rights by resorting to “a wrong, false and malicious libel” of

his character and reputation. Even were we to assume *arguendo* that there is some merit to the claim, appellant's objective would not be served by disclosure of the certificates. It was because appellant was listed as an eligible that he was tentatively considered for employment. His subsequent nonselection was predicated upon the results of the various background investigations and has no relation to the certificates or the information contained therein. Moreover, the CSC has already released the competitive standing of all the eligibles listed in the certificates such that appellant is able to ascertain his relative standing among all the eligibles without any further disclosure.

However, the record of the underlying actions herein is in fact convincing proof that appellant's claim is purely conclusory and without merit. Indeed, if one considers the manifold allegations of injury, criminal conspiracy, etc., and the number of persons already alleged to have participated in the conspiracy, it is reasonable to conclude that disclosure of the identities and locations of the respective eligibles may well subject them to harassment and vexatious lawsuits. Under such circumstances, there is no public or even reasonable private interest to be served by further disclosure of the certificates and such disclosure would be wholly unrelated to the purposes behind the FOIA.

POINT IV

The District Court correctly held that the identities of outside consultants are protected from compelled disclosure by Exemption 7(C) and (D) of the Act, 5 U.S.C. § 552(b)(7)(C) and (D), and that the identities of the agency personnel are also protected by Exemption 7(C).

A. The Scope of Exemption 7

Exemption 7(C) and (D), as recently amended,* protects from compelled disclosure:

investigatory records compiled for law enforcement purposes, but only to the extent that the production of such records would:

* * * * *

(C) constitute an unwarranted invasion of personal privacy, [or]

(D) disclose the identity of a confidential source and, in the case of a record compiled by a criminal investigation, or by an agency conducting a lawful national security intelligence investigation, confidential information furnished only by the confidential source.

* * * * *

The District Court correctly held that the Government had satisfied its burden of demonstrating that the reports of investigation are investigatory records compiled for law enforcement purposes and that the compelled disclosure of the identities of the outside consultants named

* The amendments were enacted November 21, 1974, Pub.L. No. 93-502, 88 Stat. 1561, and became effective February 19, 1975.

therein would thwart the governmental interests enumerated in paragraphs (C) and (D) of Exemption 7 (A. 30-32).^{*} The District Court also correctly held that the identities of the agency personnel who conducted the investigation were also protected from compelled disclosure by Exemption 7(C).^{**}

The threshold inquiry under Exemption 7 is whether the withheld material is investigatory and whether it was compiled for law enforcement purposes. At the outset, it cannot be disputed that the FBI's memorandum regarding its extortion investigation falls within this category inasmuch as its purpose was to determine whether appellant should be prosecuted. As to the material emanating from the preliminary and full-field investigations, although the term "investigatory records" is not defined in the Act, it is clear that such records are those which result from investigative efforts and that the records in question reflect official background investigations into appellant's suitability for civil service employment.

The term "law enforcement" includes not merely the detection and punishment of law violation but also its prevention. Thus, Exemption 7(D) explicitly covers national security intelligence investigations and the legis-

^{*} As to the nature of the Government's burden see the legislative history set forth at 120 Cong. Rec. 59336 (May 30, 1974). See also *NLRB v. Sears, Roebuck & Co.*, *supra*, at 163-165; Clark, *Holding Government Accountable: The Amended Freedom of Information Act*, 84 Yale L.J. 741, 763 (1975).

^{**} It should be noted that in its decision of February 23, 1976, the District Court included within the scope of protection of Exemption 7(D) the identities of the agency personnel as well. The Government did not argue below that Exemption 7(D) extends to the agency personnel and on this appeal concedes that it does not.

lative history includes background security investigations within that category. As stated therein:

The term 'intelligence' in section 552(b)(7)(D) is intended to apply to positive intelligence-gathering activities, counter-intelligence activities, and background security investigations by governmental units which have authority to conduct such functions. * * * Personnel regulatory and civil enforcement investigations are covered by the first clause authorizing withholding of information that would reveal the identity of a confidential source. . . . Conf. Rep. No. 93-1200, 93rd Cong. 2d Sess. 1974 U.S. Code Cong. & Admin. News, pp. 6291-6292.

This interpretation has also been recognized in *Koch v. Dep't. of Justice*, 376 F. Supp. 313 (D.D.C. 1974) in which three Congressmen sought to obtain from the FBI background files which had been compiled during investigations into their eligibility for certain government posts. Judge Gesell ruled that such files were compiled for law enforcement purposes within the meaning of Exemption 7 on the theory that:

[T]hey are maintained in aid of investigations into the possibility that applicants for government service have engaged in criminal activity or other conduct which would disqualify them from such employment. 376 F. Supp. at 315.

The background investigations of appellant which are at the root of the instant actions were similarly conducted because he had applied for civil service employment and were similarly intended to determine whether he had engaged in criminal activity or was otherwise unsuited for civil service employment. Accordingly, the records which resulted from such investigations were compiled for law enforcement purposes within the meaning of Exemption 7.

B. The identities of the individuals and/or companies contacted by the agencies as well as the identities of agency personnel who conducted the investigations are protected from compelled disclosure by Exemption 7(C)

Exemption 7(C) exempts investigatory records for law enforcement purposes the disclosure of which would constitute an unwarranted invasion of personal privacy. We have already demonstrated that disclosure of the identities of persons who responded to the various investigations as well as the agency personnel who conducted them would constitute a clearly unwarranted invasion of their personal privacy. Inasmuch as the standard required by Exemption 6—*clearly unwarranted invasion*—is more stringent than that of Exemption 7(C)—*unwarranted invasion*—any showing sufficient to satisfy Exemption 6 would also satisfy Exemption 7(C). Moreover, should the Court find that the impermissible invasion of privacy is not so severe as to be *clearly* unwarranted, it would still be sufficiently egregious as to merit protection under Exemption 7(C). Whereas the balance required by Exemption 6 tilts in favor of disclosure—see *Getman v. NLRB*, *supra* at 674 n.11—here, however, because the word “clearly” has been deleted, nondisclosure of investigatory records compiled for law enforcement purposes is permissible under Exemption 7(C) *whenever* disclosure would result in any unwarranted invasion of privacy.

C. The identities of the outside persons and/or companies who responded to the investigative inquiries are also protected by Exemption 7(D)

The purpose of Exemption 7(D) is to protect the identity of confidential sources which would be disclosed by the production of investigatory records compiled for

law enforcement purposes. Thus, so long as the sources in question are confidential, their identity may be withheld, regardless of whether disclosure would constitute an unwarranted invasion of their privacy.

It is clear from the underlying legislative history that the persons and/or companies who responded to the investigative inquiries regarding appellant are confidential sources within the meaning of the Exemption. As stated in the legislative history:

The substitution of the term "confidential source" in Section 552(b)(7)(D) is to make clear that the identity of a person other than a paid informer may be protected if the person provided information under an expressed assurance of confidentiality or in circumstances from which such an assurance could be reasonably inferred. Under this category, in every case where the investigatory records sought were compiled for law enforcement purposes—either civil or criminal in nature—the agency can withhold the names, addresses, and other information that would reveal the identity of a confidential source who furnished the information. However, where the records are compiled by a criminal law enforcement authority, all of the information furnished only by a confidential source may be withheld if the information was compiled in the course of a criminal investigation. In addition, where the records are compiled by an agency conducting a lawful national security intelligence investigation, all of the information furnished only by a confidential source may also be withheld. Personnel regulatory and civil enforcement investigations are covered by the first clause authorizing withholding of information that would reveal the identity of a confidential source but are not encompassed by the second clause authorizing

withholding of all confidential information under the specified circumstances. [*Italics added.*] Conf. Rep. No. 93-1200 93rd Cong. 2d Sess. 1974 U.S. Code Cong. & Admin. News. pp. 6291-6292.

All of the conditions for the application of Exemption 7(D) set forth in the legislative history quoted above are satisfied by the circumstances herein. First, it has already been demonstrated that the investigative inquiries were made under an express assurance of confidentiality or in circumstances from which such an assurance could be reasonably inferred. Second, the investigations in question conducted by the CSC, FAA and BNDD were background security investigations conducted for the purpose of evaluating appellant's various applications for civil service employment. Third, the authority of the agencies to conduct such investigations is not in question. Accordingly, the persons and/or companies who responded to the investigative inquiries are confidential sources within the meaning of Exemption 7(D) and their respective identities should therefore be protected from compelled disclosure.

It goes without saying that the FBI's criminal extortion investigation falls within the scope of Exemption 7(D). Moreover, the Government has the well established privilege to refuse disclosure of the identity of or information which would lead to the identity of persons supplying information concerning the commission of crimes. 8 Wigmore, *Evidence* (McNaughton rev. 1961) at 2374. This privilege has been recognized by the Supreme Court, *Roviaro v. United States*, 353 U.S. 53, 59-61 (1957), and has been applied in both civil as well as criminal cases. See, *Mitchell v. Roma*, 265 F.2d 633 (3d Cir. 1959); *Bocchicchio v. Curtis Publishing Co.*, 203 F. Supp. 403 (E.D. Pa. 1949). The privilege belongs to the Government and is designed to protect the public interest in the free flow of information about possible criminal activities.

D. The pre-amendment case law as a measure of the substantive scope of Exemption 7, supports non-disclosure.

While the pre-amendment case law is admittedly of limited precedential value, one decision should be considered in measuring the substantive scope of Exemption 7 in relation to the facts of this case.*

In *Evans v. Department of Transportation*, 446 F.2d 821 (5th Cir. 1971), *cert. denied*, 405 U.S. 918 (1972), an airlines pilot sought disclosure of letters allegedly written to the FAA regarding his capabilities as a commercial pilot. The author of the letters had been assured that his confidentiality would be maintained and the FAA refused to disclose the correspondence to the pilot. Both the District Court and the Circuit Court agreed with the FAA that the letters were protected by Exemption 7. The Court reasoned that if such letters were released, individuals would be less likely thereafter to come forward because of the potential threat of loss of anonymity. As interpreted by one commentator:

* The legislative history of the amendments indicates that Congress disapproved of those cases which relieved the Government of the obligation to show that disclosure of a particular investigatory file would contravene the purposes of Exemption 7. See 120 Cong. Rec. 59336 (daily ed. May 30, 1974). See also *N.L.R.B. v. Sears Roebuck & Co.*, *supra* at 164. The amendment does not restrict the substantive scope of the Exemption, however, and indeed goes beyond the prior cases in setting out legitimate justifications for its application. See 120 Cong. Rec. 59336 (daily ed. May 30, 1974); Clark, *Holding Government Accountable* etc., *supra* at 762-763. Rather the amended procedural framework imposes upon the Government the burden of demonstrating that the documents in question are investigatory records compiled for law enforcement purposes and that their compelled disclosure would thwart one or more of the interests enumerated in the Exemption.

The FAA and the public have an overriding interest in the competence of commercial pilots, and the court felt this interest clearly outweighed any benefits to be reaped from such disclosure.

* * * Where voluntary cooperation is vital to the investigatory function of an agency, the protection of the identity of individuals who come forth may well be a more important interest than disclosure. Note, *The Investigatory Files Exemption to the FOIA: The D.C. Circuit Abandons Bristol-Myers*, 42 George Wash. L. Rev. 869, 878 (1974).

Application of this criterion leads to a similar conclusion. As in *Evans*, the persons who responded to the investigative inquiries were under no obligation to do so. The public interest in effective criminal law enforcement and thorough investigation of the fitness of civil service applicants is akin to its interest in the fitness of commercial pilots. Indeed, the FAA's policy position and that of all the appellee agencies herein is the same as that taken in *Evans*. Disclosure of the identities of the persons and/or companies who responded to the investigative inquiries would have the same adverse impact upon the ability of the agencies to gather information and hence the effectiveness of their investigative process.

POINT V

The District Court correctly held that the pleadings failed to state a claim for damages or injunctive relief over which it had jurisdiction or upon which any relief could be granted.

In addition to the various FOIA claims for disclosure of information, appellant also seeks an injunction against further publication of such information as well as dam-

ages in the total amount of \$3,700,000. In essence, he contends that its alleged past publication constitutes "libel, slander and malicious defamation." Damages are sought to compensate for his inability to obtain employment by reason of the alleged publication of such information by the agencies and their refusal to disclose the same in unexpurgated form and for mental anguish and damage to character and reputation.

It is clear from both the pleadings as well as the affidavits of the defendant agencies that the preliminary and full field background investigations conducted by the FAA, the BNDD and the CSC including the CSC's inquiry to the FBI were exclusively in conjunction with appellant's civil service employment applications. Moreover, appellant has not even alleged publication of the results of these investigations outside of the agencies involved. Not only are such investigations authorized by law, they are in fact mandated by Executive Order 10450, 3 C.F.R. Proc. 10450 as amended (1974). Accordingly, appellant's claim that these investigations are unlawful or that there has been unlawful publication of their contents is frivolous and is not a claim upon which relief can be granted.

Moreover, this Court lacks jurisdiction over the subject matter of appellant's claim for damages to the extent that the federal defendants-appellees are sued in an official capacity. As to the alleged failure to disclose information pursuant to the FOIA, the Act explicitly delineates what remedies are available to a party for improper withholding of records. See 5 U.S.C. § 552 (a) (4) (E) and (F). The assessment of damages for improper withholding of information is nowhere permitted by statute and the only available remedy is assessment of costs and reasonable attorney fees if the plaintiff has *substantially prevailed*. Even if the District Court had found that the withholding was arbitrary or

capricious, the only statutorily permitted remedy is an administrative proceeding by the CSC to determine whether disciplinary action is warranted against the officer or employee who was primarily responsible for the withholding. Thus, regardless of the propriety of the determination of the appellee agencies to withhold the information in issue, there is no jurisdictional basis upon which an award of damages may be predicated.

As to the allegations that appellant has been defamed by the various agencies and/or agency personnel acting in an official capacity, the cause of action is in tort and hence governed by the Federal Tort Claims Act ("FTCA"), 28 U.S.C. § 2671 *et seq.* However, to that extent the cause of action is barred by 28 U.S.C. § 2680 (h) which excepts from the scope of the FTCA any claim arising from allegations of libel or slander. Inasmuch as the United States, including its constituent agencies, as a sovereign, may be sued only where the maintenance of such an action is clearly within an authorizing statute, there is no basis upon which jurisdiction may be predicated. See *United States v. Sherwood*, 312 U.S. 584 (1941); *Brown v. General Services Administration*, 507 F.2d 1300 (2d Cir. 1974), *aff'd*, 44 U.S.L.W. 4704 (June 1, 1976).*

* Appellant may contend that the failure to disclose information pursuant to the FOIA is actionable under the FTCA as a tortious act of omission. Aside from the fact that the only jurisdictional basis for such an action is the FOIA itself, the action is similarly precluded by § 2680(a) which excepts from the ambit of the FTCA:

(a) Any claim based upon an act or omission of an employee of the Government, exercising due care, in the execution of a statute or regulation, whether or not such statute or regulation be valid, or based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of the federal agency or an employee of the Government, whether or not the discretion involved be abused.

Finally, the individually named defendants, all officials of the CSC, the FAA, the DEA and the VA, are protected from suit by the doctrine of the official immunity. The individually named defendants are:

1) L. J. Churchville, Assistant Administrator of the Office of Information Services, of the FAA;

2) Dennis S. Feldman, Deputy Assistant Administrator of the Office of Information Services of the FAA;

3) Virginia M. Armstrong, Regional Director of the CSC—New York;

4) Felice Pepe, Chief of Medical Administration Services of the VA;

5) Donald J. Biglin, Assistant Executive Director for Freedom of Information, CSC;

6) Joseph T. La Rocco, Personnel Officer of the DEA;

7) Frank V. Monastero, Associate Regional Director. DEA—New York;

8) Robert J. Drummond, Director of the Bureau of Personnel Investigations, CSC; and

9) Edward M. Levi, Attorney General of the United States.

In order to establish the defense of official immunity, these defendants-appellees must demonstrate that their acts were discretionary and within the outer perimeter of their authority and further that such acts were reasonable and taken in good faith. *Barr v. Matteo*, 360 U.S. 564 (1959); *Economu v. United States Dept. of Agriculture*, 535 F.2d 688, 696 (2d Cir. 1976). These defendants-appellees can establish that their acts were within the outer perimeter of their authority if they can show that the acts more or less were connected with the general matters committed by law to their control

or supervision. See *Bivens v. Six Unknown Agents of the Federal Bureau of Narcotics*, 456 F.2d 1339 (2d Cir. 1972).

It is clear from the pleadings that the actions of these defendants-appellees which appellant contends were unconstitutional were discretionary and committed to their control or supervision. Appellant has not even alleged that the acts complained of lie beyond the scope of authority of these defendants-appellees. Moreover, the determination of whether information desired by a party is exempt from disclosure under the FOIA inevitably involves statutory interpretation and thus requires the exercise of discretion. Defendants-Appellees Churchville, Feldman, Armstrong, Pepe, Biglin, Drummond and Levi were sued as a result of their administrative decisions regarding the withholding of certain information from appellant. It is evident from their official titles set forth above that this determination is within their respective areas of control and/or supervision. Defendants-Appellees La Rocco and Monastero were sued as a result of their involvement in the background investigation of appellant conducted by the DEA and the resulting determination of that agency to pass over his application. As is equally clear from their official titles, this determination was similarly within their respective areas of control and/or supervision.

As to the good faith and reasonableness of the acts in question, the initial burden is on the complaining party to allege specific facts indicating a deprivation of rights rather than to state simple conclusions. See *Black v. United States*, 534 F.2d 524 (2d Cir. 1976); *Koch v. Yunich*, 533 F.2d 80 (2d Cir. 1976). Accepting the truth of the factual allegations contained in the pleadings, there is nonetheless a complete absence of specificity regarding the requisite bad faith or unreasonableness

of the acts complained of. On the contrary, if one fact emerges from the manifold pleadings, it is that appellant has apparently concluded that everyone involved in either the various background investigations or the processing of his FOIA claims was engaged in a conspiracy to violate his constitutional rights. Such an allegation, totally lacking in factual support, is proof of its own frivolity.

In contrast, each of the appellee agencies has submitted extensive affidavits establishing the good faith and reasonableness of both the background investigations as well as the processing of appellant's FOIA claims. In view of appellant's failure to offer whether in the pleadings or by way of rebuttal any specific facts challenging defendants-appellees' good faith and reasonableness, summary judgment dismissing the complaint was appropriate.* See *Economou v. United States Department of Agriculture*, *supra* at 696.

* The District Court treated the Government's motion to dismiss as a motion for summary judgment pursuant to Rules 12(b) (6) and 56 of the Federal Rules of Civil Procedure (A. 18).

CONCLUSION

For the reasons stated, the decision of the District Court should be affirmed.

Dated: New York, New York
October 18, 1976

Respectfully submitted,

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Southern District of New York
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STATUTORY APPENDIX

Statutory Appendix

The FOIA provides in pertinent part as follows:

"[E]ach agency, upon any request for records which (A) reasonably describes such records * * *, shall make the records promptly available to any person

* * * * *

On complaint, the district court of the United States * * *, has jurisdiction to enjoin the agency from withholding agency records and to order the production of any agency records improperly withheld from the complainant. In such a case the court shall determine the matter de novo and may examine the contents of such agency records in camera to determine whether such records or any part thereof shall be withheld under any of the exemptions set forth in subsection (b) of this section, and the burden is on the agency to sustain its action. 5 U.S.C. §§ 552(a)(3) and (4)(B).

Section (b) of the FOIA exempts from disclosure nine categories of information. Among them are the following three exemptions upon which the Government relies in this appeal:

(5) inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency;

(6) personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy;

"(7) investigatory records compiled for law enforcement purposes, but only to the extent that the production of such records would . . . (C) con-

stitute an unwarranted invasion of personal privacy, [or] (D) disclose the identity of a confidential source and, in the case of a record compiled by a criminal law enforcement authority in the course of a criminal investigation, or by an agency conducting a lawful national security intelligence investigation, confidential information furnished only by the confidential source . . . " 5 U.S.C. §§ 552(b) (5), (6) and (7).

Where an individual applies for Government employment, Executive Order 10450 mandates that an investigation be conducted to determine whether the employment of such individual is consistent with national security interests. Executive Order 10450, as amended, provides in pertinent part as follows:

Sec. 3 (a) The appointment of each civilian officer or employee in any department or agency of the Government shall be made subject to investigation. The scope of the investigation shall be determined in the first instance according to the degree of adverse effect the occupant of the position sought to be filled could bring about, by virtue of the nature of the position, on the national security, but in no event shall the investigation include less than a national agency check (including a check of the fingerprint files of the Federal Bureau of Investigation), and written inquiries to appropriate local law-enforcement agencies, former employers and supervisors, references, and schools attended by the person under investigation: * * * *

Should there develop at any stage of investigation information indicating that the employment of any such person may not be clearly consistent with the interests of the national security, there shall be conducted with respect to such person a full field

investigation, or such less investigation as shall be sufficient to enable the head of the department or agency concerned to determine whether retention of such person is clearly consistent with the interests of the national security.

* * * * *

Sec. 8. (a) The investigations conducted pursuant to this order shall be designed to develop information as to whether the employment or retention in employment in the Federal service of the person being investigated is clearly consistent with the interests of the national security. Such information shall relate, but shall not be limited, to the following:

(1) Depending on the relation of the Government employment to the national security:

(i) Any behavior, activities, or associations which tend to show that the individual is not reliable or trustworthy.

(ii) Any deliberate misrepresentations, falsifications, or omissions of material facts.

(iii) Any criminal, infamous, dishonest, immoral, or notoriously disgraceful conduct, habitual use of intoxicants to excess, drug addiction, or sexual perversion.

(iv) Any illness, including any mental condition, of a nature which in the opinion of competent medical authority may cause significant defect in the judgment or reliability of the employee, with due regard to the transient or continuing effect of the illness and the medical findings in such case.

(v) Any facts which furnish reason to believe that the individual may be subjected to coercion,

influence, or pressure which may cause him to act contrary to the best interests of the national security.

* * * * *

Executive Order No. 10450, 3 C.F.R. Proc. 10450, as amended (1974).

Regulations of the CSC provide that information regarding civil service applicants contained in certificates of eligibles is not available to the public:

The names of applicants for civil service positions or eligibles on civil service registers, certificates, employment lists, or other lists of eligibles, or their ratings or relative standings are not information available to the public.

5 C.F.R. § 294.501(e).

AFFIDAVIT OF MAILING

State of New York)
County of New York) ss

Marian J. Bryant being duly sworn,
deposes and says that she is employed in the Office of the
United States Attorney for the Southern District of New York.

That on the
21st day of October, 1976 she served ^{two} ~~A~~ copies of the
within Federal Defendants-appellees' Brief

by placing the same in a properly postpaid franked envelope addressed:

Madeline DeFina
220-31 Union Turnpike
Flushing, New York 11364

And deponent further says s/he placed the said envelope and placed the same in the mail chute for mailing in the United States Courthouse Annex, One St. Andrew Plaza, Borough of Manhattan, City of New York.

Sworn to before me this

Marian L. Bryant

21st day of October, 19 76

Reply See

ROBERT I. LEE
Jury, State of New York
No. 133 Queens County
Docket March 30, 1977